United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,472

UNITED STATES OF AMERICA,

Appellee

v.

WILLIE LUCAS,

Appellant

Appeal from the United States District Court
For the District of Columbia

BRIEF FOR APPELLANT

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QUESTIONS PRESENTED

I

Was there sufficient evidence for the jury to find deceased did not accidentally shoot herself?

II

Was there sufficient evidence of recklessness warranting the jury in finding malice?

III

Can you build an inference on an inference, to-wit: infer malice from recklessness which is inferred from the act?

IV

Should mere recklessness be second degree murder?

V

Should Courts engage in judicial legislation?

VI

Does the inclusion of recklessness in second degree murder adequately inform the defendant of the charge he is to face?

This case has not previously been before this Court.

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UNITED STATES COURT OF APPEALS
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WILLIE LUCAS

Appellant

Appeal from the United States District Court
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BRIEF FOR APPELLANT

STATEMENT OF FACTS

On September 14, 1968 officers of the Metropolitan Police Department received a radio run at 1:32 P.M. for a shooting at 906 T Street, N.W. Responding they found a rooming house and were met at the door by appellant, Willie Lucas, who told the officers that he didn't need them, he needed an ambulance, that his wife was just shot. Appellant took the officers to the third floor where they observed a Negro female lying on the left side of the foot of the bed with her head hanging over the end of the bed and a pool of blood on the floor. They observed a cartridge which was in the pool of blood. (Tr. 16,17,18) The officers noted a small hole in her left breast and also one approximately midway in the back; the front hole being higher in the body than the rear. Appellant told

the officers that they had been shooting and that his wife, the deceased, had dropped the rifle and accidentally shot herself. Appellant told the officers the rifle was behind the refrigerator. (Tr.21) Appellant told the officers that they were target practicing in the room (Tr.23) and the officers found several shots in a window and also in the door leading into the room and other various locations in the room. (Tr 23) The officer testified appellant appeared to be drinking; that he was probably high but not drunk. (Tr.29) The officer further testified (Tr.48) that the door leading into a closet had nine bullet holes in it and the wall in the rear had five bullet holes. There were bullet holes in other sections of the room. No witnesses were found who knew anything about the occurrence. It was stipulated that a substance found on the end of the gun barrel was human blood. (Tr.51).

A police officer qualifying as an expert testified that that blood indicated that there was a contact wound in the body, the tissue being forced back into the barrel by vacuum created by the shot. (Tr.56) The officer testified (Tr.58) that there were no signs of a struggle or any altercation.

A police officer qualifying as an expert testified that the type of ammunition used was 22 caliber short which was the least high-powered bullets (Tr.60) and would have the least striking penetration. A police officer testified (Tr.64) that the appellant told them that when he and his wife woke up in the morning they practiced rifle shooting on a calendar which hung on a wall in the room; they were shooting the rifle in the room on the morning in question; that he fired the rifle and put a round in the

chamber and gave it to his wife. He heard a shot and took the rifle from her, opened the bolt, ejected the empty casing and inserted a live round. At that time he looked around and he saw his wife was shot. (Tr.64) Appellant told them he had seen his wife had the rifle between her legs and when it hit the floor the rifle discharged. Appellant stated he called the police and an ambulance. (Tr.66)

The coroner testified that the track of the bullet was from front to back, top down (Tr.119) and that the decedent died because of this wound. The coroner testified, on a hypothetical question, that the wound would be inconsistent with the deceased seated on the bed with a rifle between her legs and dropping same to the floor. (Tr.121) The coroner admitted that in the same position if the deceased was bending over and the gun bounced on the floor, the exit wound would be lower than the entry wound. (Tr.127) The coroner further testified that muscles could cause deflection in low caliber, low velocity projectiles or bullets (Tr.128) and also tendons in the body. Cross-examination of the coroner on deflection of bullets was conducted by defense counsel from medical text.

The Government then rested and the Court considered a motion for a directed verdict and denied same (Tr.133) on the question of the degree of recklessness. The Court further reserved the right to hear what the jury did with the case at the end of the case.

Appellant testified in his own behalf substantially as the police had indicated. (Tr.136-140) He further testified that

he only had one eye and that his wife was seated on his blind side. He denied having any quarrel or altercation (Tr.142) and denied shooting his wife. (Tr.143) Appellant testified that it was strictly a dump where they lived and the man didn't want to fix it up as why they were shooting in the room. (Tr.148) He testified that they would shoot any place as long as the bullets wouldn't go outside. (Tr.148) Appellant testified that the plunger firing pin of the rifle had to be pulled out before it could be fired; that he didn't pull it out nor did he see his wife pull it out and that it was not pulled out when he handed it to her. (Tr.161) He testified that when he handed the rifle to his wife he looked at the target rather than at her. (Tr.162)

The defense then rested and the Court considered all motions renewed and reserved final action on them until after the jury verdict. (Tr.175) In discussing the instructions to the jury, the Court recognized the basic problem in trying to make some sense out of the erudite discussion of murder and manslaughter. Recklessness was the question. (Tr.179) The Court stated that it had difficulty on how to define negligence under the circumstances of criminal jurisdiction. The Government referred to Judge Leventhal's concurring opinion in Dixon but admitted to the Court that the jury would not understand it. (Tr.184) The Court properly defined second degree murder in that it required the death of the deceased at the hands of the defendant and malice (Tr.197) and manslaughter as unlawful killing as a result of recklessness. The Court sent on (Tr.198) to instruct the jury that they could infer malice as a necessary element of second degree murder. During the deliberation the jury sent out a note requesting certain

testimony be read and also that the book which defense counsel cross-examined the coroner on be sent to the jury room, which request was denied and the jury brought back a verdict of guilty of the charge of second degree murder. (Tr.208) The Court then stated it would re-examine its notes as to its reservation on action on defendant's motion for a directed verdict, stating that the question was whether the evidence was sufficient to reach the level of risk and recklessness of murder in the second degree. (tr.211)

A Memorandum in support of a Motion for Directed Verdict NOV was filed on March 10, 1970 and denied in a written opinion on March 16, 1970 on the basis that a guilty verdict had to be predicated on sufficient evidence of recklessness. Notice of Appeal was duly filed.

ARGUMENT

I. WAS THERE SUFFICIENT EVIDENCE FOR THE JURY TO FIND DECEASED DID NOT ACCIDENTALLY SHOOT HERSELF?

Curley v. U.S., 81 U S. App. D.C. 389 160 F.2d 229, cert. den. 331 U.S. 837 (1947), Cooper v. U.S., 94 U.S. App. D.C. 343, 218 F.2d 39 (1954), Crawford v. U.S., 126 U.S. App. D.C. 156, 375 F.2d 332 (1967) clearly lay down the standards necessary to submit a case to a jury. It is abundantly clear that if the Government's entire case merely generates a suspicion that a defendant is involved, the trial judge is not permitted to allow a criminal case to go to a jury. It is a function of a judgment of acquittal to protect against a decision by a jury based on speculation, surmise, bias and prejudice. Hunt v. U.S., 115 U.S. App D.C. 1, 316 F.2d

652 (1963), Sleight v. U S., 65 U.S. App. D.C. 203, 82 F.2d 459 (1936). The Court in this case recognized that it was a case based on circumstantial evidence (Memorandum Opinion of Judge Gesell). When circumstances are as consistent with innocence as with guilt, it is submitted that it is this Court's duty to reverse a judgment of conviction. Hammond v. U.S., 75 U.S. App. D.C. 397, 127 F.2d 752 (1942), U.S. v. Matsinger, 191 F.2d 1014,(3rd Cir. 1951), Cady v. U.S., 54 U.S. App. D.C. 10, 293 Fed. 829 (1923). Herein the Government in its case in chief put into evidence the defendant's story. A close analogy is noted to the case of U.S. v. Johnnie Bush, 416 F.2d 823. The Court itself found that there was no proof of an intentional killing (R-20). There was, therefore, no evidence that appellant killed her, even speculation was eliminated by appellant's story.

II. WAS THERE SUFFICIENT EVIDENCE OF RECKLESSNESS WARRANTING THE JURY IN FINDING MALICE?

The trial court obviously would have directed a verdict in this case were it not for the fact it believed that there was sufficient evidence of recklessness (Memorandum Opinion). The same case law cited in I above is referred to again. It is respectfully submitted that there was no evidence of recklessness. Factually the evidence showed that the defendant and the deceased were living in a "dump" (Tr.148) and had been practicing target shooting with the lowest powered charges for a period of one year. The evidence showed that the defendant had merely loaded the gun and had given it to his wife. The trial judge, having eliminated the question of intentional killing, the foregoing had to be the

basis of his belief that there was sufficient reckless conduct. It is respectfully stated that the submission of this issue to a jury can result only in a verdict based on speculation and surmise, which verdict is expressly condemned by all of the case. law.

This Court has found in U.S. v. Dixon, 22,324, dated March 27, 1969, that the recklessness required for second degree murder must display depravity in such extreme and wanton disregard for human life to constitute malice, otherwise it is only manslaughter. In the factual situation in this case when admittedly the parties were merely target shooting and had been so doing for a year without incident,can the above elements be found?

III. CAN YOU BUILD AN INFERENCE ON AN INFERENCE, TO-WIT: INFER MALICE FROM RECKLESSNESS WHICH IS INFERRED FROM THE ACT?

In this case the jury was specifically allowed to infer the malice of second degree murder from the inference that appellant's conduct was negligent. Courts have warned against speculative double or pyramided inferences. U.S. v. Ross, 92 U.S. 281 (1875), U.S. v. Russo, 123 F.2d 420, (.C.A. 3, 1941), Rosenberg v. U.S., 120 F.2d 935, 937 (C.A.10, 1941) Nations v. U.S., 52 F.2d 97, 105 (C.A.8, 1931).

IV. SHOULD MERE RECKLESSNESS BE SECOND DEGREE MURDER?

In Dixon, supra, the question of recklessness visa vis homicides, is specifically pointed out as being an area of the law which needs attention. The attention mentioned is squarely invited by the trial judge in the instant case. The attention of this Court is respectfully invited to the suggestion of the trial

judge herein as to the standards he used in clarifying the law. When the trial courts do not feel that even they have understandable guidelines to give the jury, how can it be said that a jury can intelligently render a fair verdict based on the evidence. The code does not mention the word recklessness as being an ingredient of second degree murder. Therefore, as is pointed out by Judge Leventhal in Dixon, supra, our guidance must then come from the common law.

The District of Columbia Code establishes that to convict a person of second degree murder, it must be found that he killed another "with malice aforethought". D.C. Code, section 2203, Title 22) The Code's manslaughter provision omits the reference to malice, but gives no precise definition of the term. (D.C.Code, section 2405, title 22) The courts have added to the meaning of both the above cited statutory provisions. In the case of second degree murder, malice need not be expressed, but may be implied or inferred from the circumstances of the killing. U.S. v. Dixon, supra. Manslaughter has been somewhat further clarified as the killing of another human being without malice, as, for instance, when the killing occurs in mutual combat or in passion caused by adequate provocation. Fryer v. U S., 93 U.S. App. D.C. 34, 207 F.2d 134 (1953).

A homicide resulting from a defendant's recklessness presents problems with respect to murder in the second degree and manslaughter. Judge Leventhal in his concurring opinion in Dixon, supra, discussed at length this question of recklessness and noted that this is an area of the law where further guidelines need to

be developed. Specifically, Judge Leventhal suggested that it was highly improper to instruct a jury that recklessness may result in a verdict of second degree murder, without also instructing the jury that a manslaughter verdict may be based on recklessness. Judge Leventhal concluded that where a jury is instructed that malice may be implied, and hence a verdict of second degree murder reached, if the defendant's act was so reckless as to indicate disregard of human life, there must also be an instruction that a manslaughter verdict may be predicated on recklessness. This conclusion necessarily implies that recklessness of varying degrees is involved in the two charges - to convict the defendant of second degree murder requires a showing of a greater degree of recklessness than to convict a defendant of the lesser offense of manslaughter.

Support for such a proposition can be found in the common law. According to Perkins, The Criminal Law 61 (1957), at common law, negligent conduct fell into four categories:

(1) conduct not involving unreasonable risk of death or great body injury to others

(2) conduct involving unreasonable risk of death or great bodily injury to others, this risk not being extreme in degree

(3) conduct involving unreasonable risk of death or great bodily injury to others, this risk being extreme in degree, nut without the factor of awareness on the part of the actor

(4) conduct involving unreasonable risk of death or great bodily injury to others, this risk being extreme in degree and being accompanied by an awareness of such risk together with wanton and wilful disregard of the consequences.

Categories (1) and (2) Perkins classifies as innocent homicide,

with (2) involving only ordinary negligence. Such negligence establishes a right to damages. However, the negligence required to establish criminal responsibility is of a much higher degree than that required to establish simple negligence on a civil issue. Categories (3) and (4) involve criminal negligence. Under them, negligent conduct must fall so far below the standard of social acceptability, that it can be characterized as criminal, culpable or gross negligence. Such characterization has been more precisely defined as acting carelessly and heedlessly in wilful or wanton disregard of the rights and safety of others and without due care and circumspection. State v. Sisneros, 42 NM 500, 82 P.2d 74 (1938). Further, an omission or act left undone is reckless disregard of the safety of another is included within the purview of criminal negligence.

Within the area of criminal negligence, certain distinctions exist. Thus, for criminal negligence to fit within category (4), the element of awareness on the part of the actor is required; on the contrary category (3) encompasses only acts of criminal negligence where there is no awareness on the part of the actor. The common law legally distinguished the two categories by making the actor who was unaware of the risk to which he exposed the victim guilty of manslaughter. However, the criminal who knowingly exposed someone to unreasonable risk of death or severe injury was considered guilty of murder.

Thus, at common law the most prevalent view was that one could not commit murder without the consciousness that the reckless act was one likely to cause death or serious bodily injury.

Stephen, Digest of the Criminal Law, 21-24 (7th Ed. 1926) cited in Micheal K.Wechsler, A Rationale of the Law of Homicide, 37 Colum. L. Rev. 701 (1937). It should be noted that an opposite view of the law was held by Holmes (Wechsler, at 710). According to him, the actor's awareness of the danger or risk was immaterial if he was aware of the circumstances that would lead a man of common experience to conclude that the danger was very great. The difference between these two positions has been considered wider in theory than in practice on the basis that an inference with respect to one man's knowledge must proceed from propositions about knowledge that men like the actor would generally have. Consequently, if the danger were very great most men would perceive it. (Wechsler, at 710)

Under the Model Penal Code, a person may be convicted of a crime where he acts purposely, knowingly, recklessly or negligently" (section 2.02(1). However, when a homicide is committed recklessly it is normally viewed as manslaughter, rather than murder. The latter is reserved only for very heinous cases, where the homicide is "committed recklessly under circumstances manifesting extreme indifference to the value of human life'. (Section 210.2(1)(b) Wechsler, Codification of Criminal Law in the U.S., The Model Penal Code, 68 Colum.L.Rev. 1425 (1965).

Various cases involving the reckless use of firearms give guidelines on the subject of the degree of recklessness required to justify a conviction of second degree murder as opposed to manslaughter. A conviction of murder has been held proper where the homicide resulted from an intentional firing into a crowd.

Bailey v. State, 133 Ala 155, 32 So 57 (1901); or from an intentional firing into a dwelling when there was reason to believe someone was living in the dwelling. State v. Capp, 134 N.C. 622, 46 S.E. 730 (1904); or from an intentional firing at a car Wiley v. State, 19 ARiz 346, 170 P 869 (1918).

In Banks v. Texas, 211 S.W. 217 (1919), the appellant was sentenced to death for shooting into a moving train. The court, in affirming the conviction, examined the question of malice and concluded that malice could be implied where one "deliberately uses a deadly weapon in such a reckless manner as to evince a heart regardless of social duty and fatally being on mischief". Westlerode v. U.S., 74 App. D.C. 276, 122 F.2d 56 (1928) adhered to the same view of malice in connection with the charge of murder, and also elaborated on the District of Columbia law concerning involuntary manslaughter. Thus, Westlerode, supra, held that the drunken driver who causes another's death would be guilty of manslaughter if the death was unintentionally caused by culpable negligence of a legal duty. Both Austin v. U.S., 127 U.S. App. D.C. 180, 382 F.2d 129 (1967) and Lee v. U.S., 72 U.S. App. D.C. 112 F.2d 46 (1940) depict the type of recklessness required to allow a finding of malice and hence, a murder conviction. These cases indicate that the recklessness must be extreme - that the act must be so dangerous that it reasonably might be expected to cause death.

A most recent case in the District of Columbia seems to dispose of the question of recklessness insofar as manslaughter and murder are concerned. Thomas v. U.S., 419 F.2d 1203 (1969),

involved a homicide which defendant said occurred while he and the victim were struggling over a gun. The trial court did not instruct the jury on manslaughter, but only on second degree murder, and the sort of reckless conduct which would support a conviction of murder. Referring to Dixon, supra, the court stated that: "under the law an accidental killing may be second degree murder, manslaughter, or no crime at all, depending on the degree of recklessness involved". Since it was impossible to tell how the jury would have held had there been an instruction as to manslaughter and the degree of recklessness which would result in a manslaughter conviction, the conviction of second degree murder was reversed.

Hence, it is clear that both under the common law and under the law as it has developed in the District of Columbia, recklessness may result in a conviction of manslaughter or second degree murder, depending upon the degree or severity of the reckless conduct. It is clear that to support a second degree murder charge, the recklessness must be gross and wanton. It is established, especially under the Thomas case, supra, that if the court instructs as to recklessness resulting in second degree murder, it must also instruct as to recklessness resulting in manslaughter. It necessarily follows that an instruction to the jury would have to differentiate between the degrees of recklessness required to establish each charge.

Further, according to the case law and the common law on the subject, a defendant's conduct must be grossly negligent or reckless before he can be convicted of second degree murder and, he must be aware of the risk to which he is exposing the

victim. Hence, mere recklessness alone could not support a conviction of second degree murder.

Compare the foregoing with the facts in this action where both parties were, and had been for some time, merely target shooting. They had in effect transformed their room into a shooting gallery. How can the appellant be held to be reckless in the way another person holds or handles a gun?

V. SHOULD COURTS ENGAGE IN JUDICIAL LEGISLATION?

No quarrel is had with the opinion of Judge Leventhal in Dixon, supra, in that we sometimes must go back to the common law for definitions. The question becomes, however, how many convolutions of the language and how many verbal gymnastics can the court perform to broaden or enlarge a statutory crime. Can we assume, for instance, that Congress didn't even consider reckless conduct as an ingredient of second degree murder? Can we further assume that Congress was aware of the niceties of the common law interpretation of malice aforethought, or are the courts in effect adding something to the statute which just isn't there, to-wit: that recklessness is malice aforethought. It is submitted that murder and malice aforethought by the plain everyday usage of the language means that one kills another with some type of subjective intent. Why is it even necessary to get into various nuances of the language to read something in the foregoing to include recklessness? To do so would appear to malign the Legislature in that they really didn't know what they meant and to broaden the Statute beyond what it says.

VI. DOES THE INCLUSION OF RECKLESSNESS IN SECOND DEGREE MURDER ADEQUATELY INFORM THE DEFENDANT OF THE CHARGE HE IS TO FACE?

The action herein would appear to be the best possible vehicle for pointing up the evils implicit in point V above. The defendant was charged with second degree murder:

> "On or about September 14, 1968, within the District of Columbia, Willie Lucas, with malice aforethought did shoot Doris W. Lucas with a rifle, causing injuries from which the said Doris W. Lucas did die on or about September 14, 1968."

How, by any stretch of the imagination could appellant know he was going to be tried, not for shooting Doris W. Lucas with a rifle, but engaging in reckless conduct from which she died? How, by any stretch of the imagination could counsel for Lucas by discovery available to him, have ascertained this? The record herein obviously indicates that the Government was attempting to show just what the indictment charged,(see the opening statement of Government counsel, the thrust of all of the evidence and his closing argument). The Government specifically stated at the close of the case that they were not charging negligent homicide. (Tr.182) If asked specifically, which no reasons suggest, they would obviously have answered in the words of the indictment. about what actually happened. The trial judge found (Memorandum Opinion R-20) that there was no proof of an intentional killing, but that "the practice of defendant and his wife of engaging in target practice within their own apartment whenever they got drunk exceeds mere negligence. There was <u>ample evidence of recklessness</u>." (emphasis added) A distinction must be drawn with the cases of a man shooting into a crowd and killing someone. Certainly then the

statutory words in the indictment would fairly apprise a defendant of the charge he would have to defend against. Here, no such factual situation exists. In short, appellant was convicted of doing something for which he was not charged (except by reading something into the statute which was not present) and further of which he had no notice until long after the jury had convicted him and the trial judge attempted to explain it in his Memorandum Opinion denying the motion for judgment of acquittal notwithstanding the verdict. It is submitted that an indictment should fairly apprise a defendant of the charge which he is to face and in fact this is the purpose of an indictment.

CONCLUSION

Appellant asks that the verdict be reversed and the case remanded to the lower court with instructions to enter a verdict for the appellant.

Respectfully submitted,

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TABLE OF CASES

OTHER REFERENCES

* Cases chiefly relied upon are marked by asterisks.

ISSUE PRESENTED *

In the opinion of appellee the following issue is presented:

Was the Government's evidence of causation and malice sufficient to permit the jury to find appellant guilty of murder in the second degree?

* This case has not previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,472

UNITED STATES OF AMERICA, APPELLEE

v.

WILLIE LUCAS, APPELLANT

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By indictment filed October 30, 1968, appellant was charged with second-degree murder in violation of 22 D.C. Code § 2403. On March 5, 1970, trial was commenced before the Honorable Gerhard A. Gesell, sitting with a jury, and the following day the jury returned a verdict of guilty as charged. On June 22, 1970, Judge Gesell sentenced appellant to a term of imprisonment of six to thirty years. This appeal followed.

At approximately 1:30 p.m. on September 14, 1968, Metropolitan Police Officer Charles C. Henson and his partner, Officer Michael Johnson, responded to a radio run for a shooting at 906 T Street, N.W. (Tr. 15-16, 33). Upon arrival they were met at the "front gate" by appellant, who announced "that his wife had just been shot" (Tr. 17). The officers went with appellant to his

room [1] where the incident had occurred. Officer Henson testified that upon entering the room he observed the deceased, Doris Lucas,[2] clad in only a bra and slip (Tr. 21, 54-55), "lying on her left side on the foot of the bed with her head hanging over the rear end" (Tr. 17), "facing the floor" (Tr.18). On the floor directly beneath her "dangling" head (Tr. 19) "was a large pool of blood" (Tr. 18). Reposing on that pool was a spent .22 caliber shell casing [3] (Tr. 19, 40). The police at once inquired where the weapon was located. After some hesitation [4] appellant indicated that it was behind the refrigerator in the room (Tr. 21). A .22 caliber Winchester "rifle with a sawed-off butt" (Tr. 22) was retrieved by Officer Johnson (Tr. 21).

The officers, observing the body of the deceased, noted that there was a "small hole" above the breast and another "hole approximately midway of [*sic*] the back" [5] (Tr. 20). Appellant explained to the officers "that they

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[1] The building at 906 T Street, N.W., was a three-story rooming house (Tr. 16). Appellant lived in room 3-G (Tr. 17).

[2] It was stipulated that the deceased was in fact Doris W. Lucas (Tr. 14-15, 115).

[3] The fact that the shell was on top rather than submerged in the pool of blood indicated to Detective Mosrie of the Homicide Squad "that the blood had arrived on the floor first, and that the expended shell was dropped on top of it, rather than the casing being on the floor and the blood covering it up" (Tr. 49, 61).

[4] Appellant's trial counsel, who also represents him on appeal, stated that he had no objection to the Government's use of any statements made by appellant to the officers at the scene (Tr. 12, 64).

[5] Detective Arif H. Mosrie of the Homicide Squad viewed the body of the deceased at Freedmen's Hospital (Tr. 53). He testified that the entrance wound in the decedent's chest was "approximately 2½ inches to the right of the mid-line, about 1 inch below the right clavicle." He continued, "The second wound which was more irregular in shape, indicating an exit wound, was about 1 inch to the right of the spine in the back and about 12 inches below the base of the neck. Approximately about where the eighth rib is, which would be down much lower than the front wound." (Tr. 53-54.)

were target practicing in the room and she accidentally dropped the rifle and shot herself" (Tr. 23). There was ample evidence that the gun had been fired in the room many times; there were bullet holes in the window, in the door and closet, and also in a calendar that hung on the wall (Tr. 23-27, 43-46, 48-49), as well as spent .22 caliber shells scattered around the room. There were no holes in the ceiling. Further examination of the room revealed an expended .22 caliber slug imbedded in the mattress. Detective Mosrie, who arrived within a few minutes to investigate the incident (Tr. 35-36), noted that the slug extended into the mattress in a southward direction for about ½ inch. There was a tear on the bed sheet with a small gray marking no more than one inch from the mattress hole (Tr. 42-43). Found under the bed was a small .25 caliber pistol, but there was no indication that it had been fired (Tr. 27-28, 47-48, 56-57). Several gin bottles and beer cans were in the room; and although appellant was not drunk, he "was probably high" (Tr. 29, 52).

Detective Mosrie testified that the fatal shot was fired from an "extremely close" range (Tr. 55) and that the death wound apparently was a "contact-type wound" (Tr. 55). He noted that "human blood" appeared to be on the "point" of the rifle barrel as well as inside it (Tr. 50-52). He explained, "[A]ny time there is a contact wound, you quite often find what we term blow-back. It is tissue forced back into the barrel by vacuum created by the shot—blood and tissue." "[I]t has to be very close." In this case, considering the small caliber weapon, he concluded that the barrel was "approximately within an inch" (Tr. 55-56, 124-125).

Mosrie's partner, Detcetive Clarence J. Day, while discussing the incident with appellant, was told by appellant that he and his wife were the only people in the room when the fatal shot was fired (Tr. 65). Appellant told Detective Day that his wife was killed when the rifle discharged after she dropped it to the floor, butt end first (Tr. 64-71), with the barrel in her hands.

After appellant was arrested, a search of his person revealed "six live .22 caliber rounds of ammunition" in his left front trouser pocket (Tr. 75-76).

Although Detective Day was not an "expert" on weapons (Tr. 80), he was familiar with the way in which this particular weapon functioned. He testified that this rifle "has a number of safeties on it" (Tr. 71). Demonstrating with the rifle in evidence (Tr. 22), he began to identify the "safeties":

> You insert the shell, the live round into the breech, you shove the bolt home and lock it fast.
>
> The weapon will not fire in this position. You can pull the trigger; it will not fire. The only way you can cause it to fire is you have to pull the firing pin back by pulling this hammer, that inserts the trigger, it engages the trigger. Then when you are ready to fire the weapon, you have to pull the trigger, and the bolt goes forward.
>
> Now, if you pull the bolt back and push the safety over, you still can't fire it. That is the safety also. (Tr. 72.)

Several of the Government's exhibits were submitted to the F.B.I. Laboratory for testing and analysis. The results of the F.B.I. examination were stipulated into evidence. The bullet found in the mattress, a .22 caliber lead slug, was of the type loaded into the spent cartridge found in the blood at the foot of the bed (Tr. 109). The foreign smear found on the bed sheet adjacent to the hole in the mattress was lead (Tr. 111). The rifle was tested to determine if it would malfunction or fire in a way other than by pulling the trigger. When it was dropped to the floor several times from a distance of less than six inches, it did not discharge, but when dropped from a greater distance it fired. The trigger mechanism was tested and was found to fire when three pounds of pressure was exerted upon it (Tr. 110). Of the six live rounds of .22 caliber ammunition found in appellant's pocket, one was identified as having been loaded

into and extracted from the rifle that fired the fatal shot (Tr. 110).

Dr. Linwood Rayford, Jr., Deputy Chief Coroner for the District of Columbia, performed an autopsy on the body of Doris Lucas (Tr. 113-115). External examination revealed blood on the face, particularly in the mouth and nose. In observing the chest he noted "a quarter inch circular hole located three inches to the right of the midline just below the collar bone." It was "the entry wound for a slug" and "consistent [in size] with a .22 [caliber bullet]" (Tr. 116, 119). "There was an irregular circular hole located one inch to the right of the midline of the back" and six inches below the collar bone. "This had all the characteristics of . . . [a] projective exit wound" (Tr. 117). Internal examination revealed that the "track of the missile" went through the body at approximately a 45-degree angle (Tr. 120) downward from "front to back . . . and slightly to the left" (Tr. 118). The bullet traveled straight through the body without deflection by bones, muscles or tendons (Tr. 118, 127-128). When questioned about the blood alcohol level of the deceased, Dr. Rayford stated that she was "well under the influence of alcohol"[6] (Tr. 125-126).

In response to hypothetical questions, Dr. Rayford stated his opinion that the wound suffered by the deceased was inconsistent with her being seated on the bed, with the rifle between her legs having fallen to the floor, stock end first, and then discharging. He stated that had that been what occurred, then the entry wound would have been *below* the exit wound (Tr. 121-122). The doctor acknowledged that if the deceased had been bending over the rifle at the time it discharged, it would be possible for the entry wound to be above the exit wound (Tr. 126-127). However, irrespective of the position of the decedent when the shot was fired, the path of the bullet would have been upward toward the ceiling

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[6] The blood alcohol level of the deceased was determined to be .31 percent (Tr. 126).

rather than downward toward the mattress (Tr. 125, 128-129).

After the Government rested its case (Tr. 131), appellant's motion for judgment of acquittal was denied (Tr. 133).

Appellant in his own testimony reconstructed the events of that day, starting from the time he awoke:

> When we first woke up, we have half a fifth of gin. So we drank that. By that time the liquor store was open. So she and I go to the store and get a half a pint. We comes back, we drinks that.
>
> So I called the man I was working with. He told me to come out, you know, to get some money. I went out there and got the money and on the way back I stopped at the liquor store and bought another drink. (Tr. 137.)

It was at that time that appellant acquired the .25 caliber automatic pistol which the police found under his bed. He testified, "I was coming from the liquor store. A fellow wanted it for a few dot [*sic*]. I gave him $4. He asked me to keep it for him until he got my money back." (Tr. 147.) Appellant then returned home and found his wife seated on the side of the bed, holding the rifle and contemplating shooting at the door calendar (Tr. 137, 139). Without first ascertaining if his newly acquired pistol was loaded (which it was (Tr. 48, 57-58)), and without any apparent reason, he "just tossed it under the bed" (Tr. 147); then he took his newly acquired gin bottle and "tossed [it] on the bed" (Tr. 137, 139). He sat down on the bed next to his wife (Tr. 137-138); "she was on [his] bad side"[7] (Tr. 138). He watched her shoot at the calendar, but she missed (Tr. 137, 139). Appellant said to her, "Let me show you how" (Tr. 137). He took the gun and fired at the same target, but he also missed. He reloaded the gun, gave it

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[7] Appellant wore an eye patch over one eye. He has had "no eyeball or anything there" since "it was taken out in '58—'57" (Tr. 138). Appellant sat at the foot of the bed to the decedent's right (Tr. 65-66, 68).

back to her and then turned to look at the target (Tr. 137, 139-140, 162). When the gun fired, appellant looked back at his wife and saw the stock of the gun on the floor and the barrel of the gun in her hands pointed at her chest (Tr. 162). He testified, "When the shot went off, I was reaching for my bottle . . ." (Tr. 163-164). After the shot was discharged and the rifle "dropped," he retrieved the rifle from his wife's hands, ejected the spent shell and "reloaded . . . and started shooting" (Tr. 140, 167). He testified that "at that time she started tilting towards me" (Tr. 140, 165). As her body fell across the bed toward appellant it did not touch him because he "jumped out of the way" (Tr. 166).

On cross-examination appellant testified that on the morning of the fatal shooting they "just sat there and drank" (Tr. 148). They would shoot only when they were drinking, and normally when they drank they would shoot (Tr. 150). When asked if they were in the habit of shooting at the windows, he responded that they would shoot at the base of the window but "not at the glass." "We be drinking and we shoot any place, so long as the bullet wouldn't go outside" (Tr. 148). He confided, "This was strictly a dump we lived in and the man didn't want to fix it up and we didn't give him much help" (Tr. 148). They were in the habit of shooting in the apartment after they "found out nobody in the hall could hear it . . ." (Tr. 144). They "had been doing that a long time" (Tr. 146) and had had the gun for a year (Tr. 146, 149). Appellant testified that his wife was familiar with the rifle and was experienced in handling it. "She was good, very good" (Tr. 149). To his knowledge, she had never dropped the rifle so as to cause it to discharge (Tr. 149). But he "didn't pay any attention" to how she controlled the weapon (Tr. 149), notwithstanding the fact that they would fire it while intoxicated.

After imparting that testimony, appellant rested his case (Tr. 173). The court then adjourned for the day but first advised counsel to return to court prepared to discuss instructions, giving particular attention to the

"issues of negligence both under murder two and manslaughter" (Tr. 174-175).

Upon reconvening, counsel for appellant requested the court to deliver a "very minimum of instructions" (Tr. 178). In reviewing its instructions with counsel, the court determined (with the stated gratitude of both counsel) not to discuss "negligence" with all its nuances and variations but to confine its instructions to the "two standards of recklessness" contemplated in the offenses of manslaughter and murder in the second degree (Tr. 185). After the court delivered its charge, both counsel indicated they were "satisfied" (Tr. 201).

ARGUMENT

The Government's evidence of causation and malice was sufficient to permit the case to go to the jury.

(Tr. 15-173)

Appellant argues that the evidence could have enabled the jury to find that the deceased shot herself by accident; therefore, he continued, the Government failed to prove that the act of appellant caused the death of the deceased. We disagree.

In evaluating the evidence on appeal "it must be reviewed in the light most favorable to the Government, making full allowance for the right of the jury to draw justifiable inferences of fact from the evidence adduced at trial and to assess the credibility of the witnesses before it." *United States* v. *Hardin*, D.C. Cir. No. 22,683, decided December 22, 1970, citing, *inter alia*, *Crawford* v. *United States*, 126 U.S. App. D.C. 156, 375 F.2d 332 (1967); *Curley* v. *United States*, 81 U.S. App. D.C. 389, 160 F.2d 229, *cert. denied*, 331 U.S. 837 (1947). That the jury could have viewed the evidence to find that the deceased accidentally shot herself is not determinative. " 'It is for the jury to consider these opposing possibilities and to draw the appropriate inferences.' " *United States* v. *Harris* —— U.S. App. D.C. ——, ——, 435 F.2d 74, 91 (1970), quoting from *Anderson* v. *United States*,

406 F.2d 529, 532-533 (8th Cir. 1969). *See also Holland* v. *United States*, 348 U.S. 121 (1954); *Howard* v. *United States*, 128 U.S. App. D.C. 336, 339 n.1, 389 F.2d 287, 290 n.1 (1967); *Hunt* v. *United States*, 115 U.S. App. D.C. 1, 316 F.2d 652 (1963).

The jury heard testimony that appellant was alone in the room with the deceased in an inebriated atmosphere at the time the fatal shot was fired (Tr. 65). It heard testimony that the bullet traveled in a downward path straight through the body without deflection and came to rest in the mattress of the bed on which she was seated. (Tr. 116-118, 125-128). There was no evidence of any bullet holes or marks on the ceiling. This evidence, taken together, permitted the jury to reject the theory of accident posited by appellant, who maintained that the deceased was killed when the stock of the rifle fell to the floor and thereby discharged the bullet in an upward direction into her chest. There was in the evidence "a basis for reasonable inference" that appellant shot his wife. *United States* v. *Lumpkins*, D.C. Cir. No. 23,503, decided December 23, 1970, slip op. at 3; *see Crawford* v. *United States*, *supra*.

Appellant further asserts that the evidence of recklessness was insufficient to permit the jury to find malice. This challenge is likewise insubstantial.

It is eminently clear that recklessness may be of such dimension as to satisfy the malice requirement for conviction of second-degree murder. *Carter* v. *United States*, D.C. Cir. No. 21,591, decided December 8, 1970; *United States* v. *Wharton*, —— U.S. App. D.C. ——, 433 F.2d 451 (1970); *Thomas* v. *United States*, 136 U.S. App. D.C. 222, 419 F.2d 1203 (1969); *United States* v. *Dixon*, 135 U.S. App. D.C. 401, 419 F.2d 288 (1969) (Leventhal, J., concurring). It is equally clear that the jury may, if it so chooses, infer malice from the use of a deadly or dangerous weapon. *United States* v. *Hardin*, *supra*; *United States* v. *Wharton*, *supra*; *Belton* v. *United States*, 127 U.S. App. D.C. 201, 382 F.2d 150 (1967); *Howard* v. *United States*, *supra*; *Green* v. *United States*, 132 U.S.

App. D.C. 98, 405 F.2d 1368 (1968). In the case at bar appellant and his deceased wife were allegedly engaged in "target practice" in their home after having consumed two bottles of gin and as they were about to embark on a third (Tr. 23, 29, 137, 139). In that alcoholic atmosphere, and without appellant's "pay[ing] any attention" to how his wife controlled the loaded rifle, she was killed (Tr. 149). The jury found in accordance with the court's instructions that the conduct of appellant was so reckless as to evince "a heart lacking regard for life and safety of others" (Tr. 196), that appellant acted "so recklessly or wantonly as to manifest depravity of mind and disregard of human life" (Tr. 197). *Mitchell* v. *United States*, —— U.S. App. D.C. ——, —— n.9, 434 F.2d 483, 489 n.9 (1970). The court with great care and precision (Bond Motion Tr. 2-3), and after consultation with counsel (Tr. 174, 178-185), instructed on the issue of malice (Tr. 195-199) with deference to precedent. See *Carter* v. *United States*, *supra*, slip op. at 8 n.18, which adopts the concurring opinion of Judge Leventhal in the *Dixon* case; *United States* v. *Bush*, 135 U.S. App. D.C. 67, 416 F.2d 823 (1969). It cannot be said on the instructions as delivered and on the evidence as heard that there was insufficient basis upon which the jury could find malice.[8]

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[8] Appellant raises other points which in our view merit only brief comment.

First, he questions, without asserting error, whether the jury can infer recklessness from the act of appellant and then infer malice from the recklessness. We submit that as stated in *United States* v. *Harris*, *supra*, in a circumstantial case, where the facts logically support such inferences, they should be permitted.

Second, appellant asks if "mere' recklessness can support a conviction of second-degree murder. We submit that this was not a case of "mere" recklessness. With that precise question before them, the jury found that appellant acted with malice, which distinguishes second-degree murder from manslaughter. *United States* v. *Wharton*, *supra*, —— U.S. App. D.C. at ——, 433 F.2d at 454. There are a multitude of cases which dispositively state that proof of recklessness may satisfy the malice requirement. *E.g.*, *Carter* v. *United States*, *supra*; *United States* v. *Dixon*, *supra*.

Third, appellant asserts that the courts are usurping the function of Congress by engaging in "judicial legislation" (Brief for appel-

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed.

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lant at 14). He contends that by holding that recklessness in certain circumstances can amount to malice, the courts have read into the second-degree murder statute language that Congress did not intend or understand to be there. He offers no support for his contention from any judicial authority; indeed, he has not even cited the legislative history to determine the congressional intent or the extent of its knowledge. The fact that the courts interpret and construe the language of Congress does not mean that they have invaded the domain of Congress. *Cf. Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803). Appellant's argument is essentially a denial of the existence of the clear qualitative distinction between the recklessness that results in manslaughter and that which gives rise to the malice which is an element of second-degree murder.

In further pressing this point appellant argues that the second-degree murder indictment is defective in that it fails to include the element of recklessness. Appellant asks, "How, by any stretch of the imagination could [he] . . . know he was going to be tried . . . [for the mere recklessness which caused the death of his wife]?" (Brief for appellant at 15). We submit that counsel is presumed to know the law under which his client's guilt or innocence is to be adjudicated. Accordingly, he is presumed to know the legal meaning of term "malice aforethought" and, by the use of that term in the indictment, is therefore put on notice as to what he must defend against. *See Carter* v. *United States*, *supra*, slip op. at 8; *United States* v. *Wharton*, *supra*, —— U.S. App. D.C. at —— and nn. 10-14, 433 F.2d at 454 and nn. 10-14; *United States* v. *Dixon*, *supra*, 135 U.S. App. D.C. at 405-406 n.4, 419 F.2d at 292-293 n.4.

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